U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

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[redacted]

MAR 0 2 2004

FILE: [redacted] Office: FRANKFURT, GERMANY Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Frankfurt, Germany. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, and the April 25, 2003, AAO order dismissing the appeal will be withdrawn.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude. The applicant married a United States citizen (Mr. [redacted] in Germany on February 1, 2001, and she is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside with her spouse and child in the United States.

The officer in charge (OIC) concluded that the applicant had failed to establish extreme hardship would be imposed upon a qualifying relative. The application was denied accordingly.

On appeal, the applicant requested that a waiver be granted so that she and their soon to be born child could accompany Mr [redacted] on his forthcoming reassignment to the United States. The applicant asserted that she was pregnant and expected to give birth on January 31, 2003. The applicant asserted further that Mr. [redacted] and their soon to be born child would suffer extreme hardship if the waiver application were denied because she would be the primary caretaker of their child and because she was financially dependent on Mr. [redacted] The applicant additionally asserted that she had no legal right to live in Germany and that she was unable to return to her native country, Cuba, because she had filed for asylum in Germany in 1998, and was subsequently blacklisted by the Cuban government.

The AAO found on appeal that the applicant had failed to establish Mr. [redacted] would suffer extreme hardship if she were not granted a waiver of inadmissibility. The AAO noted that the applicant had a Cuban passport and had been able to return to Cuba since applying for asylum in 1998, and that the record contained no evidence to document her assertion that she had been blacklisted in Cuba or that she had no legal rights in her native country. The AAO additionally found that, based on the evidence in the record, the applicant appeared to have a pending asylum application in Germany and presumably had the right to remain in Germany until the case was adjudicated. In addition, the AAO found that the record contained insufficient evidence relating to the applicant's pregnancy or the birth of her child, and that hardship to the child could therefore not be considered.

8 C.F.R. § 103.5 states in pertinent part:

> (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.
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> . . . .
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> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

In her motion to reopen, the applicant, through her husband, asserts that she now has a U.S. citizen son, born January 23, 2003, and that a copy of the child's birth certificate and U.S. passport are now contained in the record. The applicant asserts that Mr [redacted] has a 29-year work history with the U.S. military in Germany,

and that he has presently exceeded his maximum time limitations for working in Germany. As a result, the applicant asserts that in order to maintain his career status with the U.S. military, Mr[redacted] must be transferred back to the U.S. immediately. The applicant states that she has been the primary caretaker of their infant son, but that due to her inability to legally reside or work in Germany or any other country, Mr[redacted] will take their son with him when he returns to the United States. The AAO notes that the record contains a sworn and notarized affidavit from Mr[redacted] stating that he will return to the U.S. with his son in the event that his wife's waiver application is denied. The applicant asserts further that Mr[redacted] earns about $28,000 a year and that it would be a financial hardship for him to support two households with his present income. The AAO notes that the record contains a May 2003, pay statement reflecting Mr[redacted] earnings.

The applicant reasserts that, although she is a Cuban citizen, she no longer has the right to reside in Cuba because she applied for asylum while in Germany. The applicant asserts that at present she has the right to visit Cuba only for immediate family emergencies, and that even under emergency circumstances she can remain in Cuba for only 21 days. In support of this assertion the applicant submits copies of her Cuban passport containing two Cuban visas issued for 21-day periods. Mr[redacted] additionally states on motion that a Cuban Consulate Officer informed him that the applicant was no longer considered to be a resident citizen of Cuba because she had been put into the German political asylum system, against her Cuban citizenship.

The applicant asserts that contrary to AAO presumptions, she no longer has a pending asylum application in Germany, and that in order to obtain the NATO/SOFA German visa allowing her to remain in Germany as the spouse of a U.S. military employee in Germany, she was required to withdraw her pending asylum application. In addition, Mr.[redacted] states on motion that on May 9, 2003, he was informed by the German Government Visa Official,[redacted] that the applicant would not receive a special NATO/SOFA visa unless she was removed from the German asylum system.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if–
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> . . . .
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> (1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant

conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[W]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted.)

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In the present case, the record reflects that the applicant's U.S. citizen husband and infant son will move to the United States when Mr. [redacted] military transfer becomes effective. The record reflects further that the applicant will be unable to remain in Germany and has arranged to stay as a visitor in the Czech Republic for 6 months. Subsequent to her stay in the Czech Republic, it is unclear where the applicant will live, as it appears, based on the evidence in the record, that she does not presently have the right to permanently reside in any country. The record reflects further that even if the applicant obtained permission to reside in another country, unless she were able to also work in that country, Mr. [redacted] would need to support the applicant completely on his salary. Moreover, the AAO notes that if the applicant has no citizenship or residency in another country, Mr [redacted] and the applicant's son would be unable to make the choice of moving to the applicant's home country to be with her.

The AAO finds that the totality of the new evidence provided in the applicant's motion to reopen demonstrates that the increased financial and family responsibilities, as well as the emotional and practical effects of family separation on Mr. [redacted] and the applicant's infant son, go significantly beyond the hardships normally experienced by family members of an excluded alien. The AAO therefore finds that the applicant has established that her husband and son would suffer extreme hardship if her waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the

> exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's February 1, 1999, conviction for the offense of attempting to illegally enter the Federal Territory of Germany; the applicant's October 18, 1999, conviction in Germany, for the offense of theft (shoplifting) (a crime involving moral turpitude – "CIMT"); the applicant's June 16, 2000, conviction in Germany, for the offense of theft (shoplifting) in two separate cases that were joined in one indictment (a CIMT). The applicant was fined for the attempted illegal entry and first theft conviction, and she was sentenced to four months imprisonment and three years probation for the second and third theft convictions.

The favorable factors in the present case are the extreme hardship to the applicant's infant son and husband; the applicant's lack of immigration violations in the U.S.; the affidavits from the applicant's husband stating that the applicant is a person of good moral character; the lack of a criminal record or offense since June 2000; the present recommendation by the Service Officer in Charge, Frankfurt, Germany, that the applicant's waiver application be approved.

The AAO finds that the crimes committed by the applicant are very serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.